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75-1103
Supreme Court, U.S.
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# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

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**LOCAL UNION NO. 2-477, OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION,**

*Petitioner*

*—vs—*

**CONTINENTAL OIL COMPANY,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

The Petitioner, Local Union No. 2-477, Oil, Chemical & Atomic Workers International Union, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 7, 1975.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at ____ F.2d ____ , 90 LRRM 3040 (10th Cir. 1975), and appears in the Appendix hereto. The District Court opinion also appears in the appendix hereto and it has not been published.

## STATUTORY PROVISIONS INVOLVED

This suit is brought pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185.

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 7, 1975, reversing in part the District Court's decision in favor of Plaintiff which was entered on November 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether a dispute between a union and company over the consolidation of two practically identical grievances before a single arbitrator in a single arbitration proceeding arising under a collective bargaining agreement with a broad grievance and arbitration procedure, which agreement is silent on the matter of consolidation, is a procedural question for the arbitrator and not the court to determine.

2. Whether the failure of the parties to a collective bargaining agreement to select an arbitrator for a second grievance (referred to as "72-1") from the names provided by the Federal Mediation and Conciliation Service amounts to a "jurisdictional defect" which prevents the arbitrator selected for the first grievance ("71-8") from hearing and granting the union's motion to consolidate the two grievances.

3. Whether the Court is precluded from reviewing the merits of Arbitrator Lazar's decision granting the union's motion for consolidation of grievances ("71-8") and ("72-1") by the limited and restricted standards of judicial review applicable.

4. Whether the Respondent's failure to assert the defense of lack of submission of the second grievance ("72-1") before Arbitrator Lazar prior to the hearings and decisions on the union's motion to consolidate and upon the

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merits of the two grievances precludes the assertion of said defense thereafter in the Court action to compel enforcement of Arbitrator Lazar's award.

5. Whether the letter of appointment (Pl. Ex. 1)[1] notifying Arbitrator Lazar of his selection to arbitrate grievance "71-8" constituted a "submission agreement" for that single grievance only and thereby precluded him from considering the second grievance "72-1" together with the first upon the motion of the union, made in advance of the arbitration hearing with prior notice to the company.

## STATEMENT OF THE CASE

This is an action to enforce a labor arbitration award (Appendix C) rendered by Professor Joseph Lazar, Arbitrator, on November 2, 1972 concerning two grievances, No. 71-8 dated December 16, 1971, and No. 72-1 dated January 20, 1972, which arose under a collective bargaining agreement in force between the Petitioner (hereinafter "Petitioner" or "Union") and Respondent (hereinafter "Respondent" or "Company"). Both grievances arose within approximately one month of each other, involved the identical issue (that is, the assignment of overtime outside of job classification), involved the violation of the same key contractual provision, (that is, Article VI, Section 2, Paragraph A of Pl. Ex. 15), were processed jointly through most of the grievance and arbitration procedure, and both grievances raised matters subject to arbitration under the contract (See, Appendix B at p. B-2; Opinion of the United States Court of Appeals for the Tenth Circuit).

The collective bargaining agreement between the parties provided a broad grievance and arbitration procedure for the processing and resolution of "grievances" culminating in final and binding arbitration before a "neutral arbitrator." The contractual grievance and arbitration procedure applicable is set forth in Appendix D attached hereto. The matter of consolidation of grievances is not explicitly addressed in the

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[1] References to the Plaintiffs trial exhibits are designated herein as (Pl. Ex. #).

grievance and arbitration procedure or in any other provision of the collective bargaining agreement between the parties. The term "grievance" is broadly defined in Article IV, Section 1, as:

> ". . . a grievance shall mean complaints, disputes or claims of unfair treatment involving the application or interpretation of the terms of this Agreement." [Appendix D-1]

Thus, the dispute which arose over the consolidation of grievances 71-8 and 72-1 was a dispute encompassed within the broad definition of "grievance" set forth above and is not excluded from the grievance and arbitration procedure by any language in the collective bargaining agreement.

Furthermore, the question of inclusion of the matter of consolidation under the broad grievance and arbitration clause in the instant case was for Arbitrator Lazar to decide since it was his job to interpret and apply the contract. National labor relations law and policy give the arbitrator broad power to consider the conduct of the parties in determining disputes arising under the collective bargaining agreement.

The grievance procedure was followed for both of the above grievances without success through and including the meeting between the Workmen's Committee of the union and the Refinery Department Manager of Operations, Mr. Tom Zeien, which took place on February 11, 1972 at the Denver Refinery. At said meeting the two grievances were treated as similar and were talked about at one time (T 101-102).[2] Mr. Zeien's written answer to the two union grievances which was prepared shortly after the meeting with the Workmen's Committee consisted of *one* letter dated February 17, 1972 (Appendix C-24; Pl. Ex. 6) in which he discussed both grievances as if they were one and denied both grievances for the same reason(s).

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[2] References to the reporter's transcript of the trial proceedings are designated herein as (T # ).

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Next, Mr. Robert G. Steele, a member of the Workmen's Committee, was designated union arbitrator for both grievances and Mr. Cooper S. Allen, Director of Personnel Relations, Billings Refinery, was designated company arbitrator for both grievances. A conference was held between the partial arbitrators designated above on April 27, 1972 at the Regency Club in Denver, Colorado, at which time the grievances were talked about at the same time and were treated as a "single grievance" (T 93, 95). Shortly after the above conference, Mr. Allen proposed to settle both grievances together in one way (T 96, 133).

After the union rejected the company's settlement offer for both grievances, the company arbitrator sent two separate letters to the Federal Mediation and Conciliation Service requesting lists of prospective arbitrators for each of the two grievances. The FMCS responded by providing a separate list for each grievance, each containing the names of five different prospective neutral arbitrators. The union and company arbitrators selected Professor Joseph Lazar as neutral arbitrator from the list provided in connection with grievance 71-8 by means of alternate striking of names in a phone conversation. The union made attempts through its representatives and through its attorneys to obtain the agreement of the company to consolidate the two grievances in a single arbitration; however, the company refused. No arbitrator was ever selected from the FMCS list provided in connection with grievance 72-1; however, time limits, if any, were waived by the parties.

Arbitrator Lazar was notified of his selection by letter dated August 28, 1972 (Appendix B-3; Pl. Ex. 1) which was prepared by Mr. Allen, company arbitrator. This letter was never signed by Mr. Steele, union arbitrator. Nevertheless, the Court of Appeals for the Tenth Circuit construed this letter to constitute a submission agreement relying upon the fact that only grievance 71-8 was referred to therein and that grievance 72-1 was not referred to specifically in said letter.

Neither Arbitrator Lazar nor the District Court construed the above letter of August 28, 1972 to constitute a

submission agreement and even the company has never so contended.

Next, Professor Lazar, through phone conversations with the parties, arranged to conduct the arbitration hearing on October 3, 1972, by agreement of all concerned. In mid-September, 1972, prior to the hearing date, Arbitrator Lazar received a letter dated September 12, 1972 from the union enclosing the "Union's Motion to Consolidate Grievance 71-8 with 72-1 for Hearing and Award," (Pl. Ex. 3) a copy of which was forwarded to the company arbitrator. The company responded by means of a letter dated September 15, 1972 from William E. Elliott, Esq., attorney for the company, addressed to Arbitrator Lazar which letter objected to the union's motion for consolidation (Pl. Ex. 9; T 33-34). Mr. Elliott in the above letter contended, *inter alia*, that Arbitrator Lazar lacked authority to consolidate based upon Section 6 of Article V of the agreement. Mr. Elliott gave no other reasons for Arbitrator Lazar's alleged lack of authority and Mr. Elliott failed to specify in this letter, or at any other time prior to the commencement of litigation to enforce the award rendered by Arbitrator Lazar, that Arbitrator Lazar lacked authority to consolidate based upon the failure of the parties to properly submit grievance 72-1 to arbitration.

Upon receipt of the union's motion for consolidation and the company's objection to the union's motion, Arbitrator Lazar phoned the parties and arranged for a special meeting regarding consolidation to take place on September 27, 1972 at the Ramada Inn in Denver, Colorado, (T 35) to which the parties agreed. However, on September 26, 1972, the day preceding the date of the special hearing on the union's motion to consolidate, Mr. Elliott sent a telegram (Appendix C-2, Pl. Ex. 10) to the arbitrator and to the union advising that the company refused to participate in the hearing on the consolidation scheduled to take place the following day. Further, Mr. Elliott advised both the arbitrator and the union that if the grievances should be consolidated, the company would not participate in the arbitration on the merits and would not abide by any award that resulted.

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Notwithstanding Mr. Elliott's telegram, the hearing on consolidation was held as scheduled. The union was represented at said hearing but no representative appeared on behalf of the company.

After the hearing on the union's motion to consolidate was completed, Arbitrator Lazar prepared his decision on that same day (Pl. Ex. 12; See Appendix C-7) and telegrammed it that evening to the company and to the union. Arbitrator Lazar granted the union's motion for consolidation and, in his decision, discussed and construed the applicable contractual provisions in light of the manner in which the company and union had united these two grievances in the grievance and arbitration stages. He concluded in his decision that a "united" grievance consisting of 71-8 and 72-1 was submitted to him, already in unified form at the time first submitted. Mr. Allen's letter of August 28, 1972 (Pl. Ex. 1), which the Tenth Circuit construed as a submission agreement, was merely notification of Arbitrator Lazar's selection to arbitrate the issue of overtime assignment. This letter notified the arbitrator that the grievance concerned "overtime assignment" which was the subject of both grievances 71-8 and 72-1. Thus, even assuming *arguendo* that the above letter was a submission agreement, the grievance submitted dealt with the issue of overtime assignment and was a combination of grievances 71-8 and 72-1. At trial, Arbitrator Lazar explained that he examined all of the exhibits presented to him by the union at the hearing on consolidation in the context of the contractual language and he stated that the concrete facts required him to rule that the two grievances were single and that he was simply reaffirming the unification accomplished by the company (T 59-60).

Arbitrator Lazar conducted the October 3, 1972 hearing on the merits as scheduled. No representatives appeared on behalf of the company while several representatives appeared on behalf of the union. After the hearing was concluded, Arbitrator Lazar telegrammed the company, offering it an opportunity to file a posthearing brief (T 51) and, subsequent thereto, sent a copy of the union's brief to the company, providing it with an opportunity to respond (T 52). Mr. William E. Elliott, company attorney, advised the arbitrator

by letter that it did not intend to file an answer to the union's brief. On November 2, 1972, Arbitrator Lazar rendered a written arbitration award (Appendix C; Pl. Ex. 14) which he mailed to all parties. The company has refused to comply with this arbitration award and has refused to pay Arbitrator Lazar its share of the cost of his services.

The District Court enforced Arbitrator Lazar's entire award relying principally upon *John Wiley & Sons v Livingston*, 376 U.S. 543 (1964) and *Avon Products, Inc v United Auto Workers*, 386 F.2d 651 (8th Cir. 1967) and based upon important policy considerations of labor management relations and labor arbitration. In this connection, the District Court stated, *inter alia*, that judicial interference with collective bargaining should be minimized, that labor arbitration should not be encrusted with a set of common law principles forced upon it by the courts and that the company (Respondent) should not be permitted to frustrate the entire process by asserting error upon the basis of evidence not made available and arguments not presented to the arbitrator.

The Tenth Circuit Court of Appeals affirmed in part and reversed in part the decision of the District Court. The Tenth Circuit affirmed enforcement of the award of Arbitrator Lazar on grievance 71-8, and reversed enforcement of the award on grievance 72-1. The Tenth Circuit's refusal to enforce grievance 72-1 was based upon the finding that there was a failure to submit grievance 72-1 to arbitration at all. The Circuit Court concluded, without giving deference or even consideration to the arbitrator's decision, that Mr. Allen's letter of August 28, 1972 (Appendix B-3; Pl. Ex. 1) to Arbitrator Lazar notifying him of his selection as arbitrator was a "submission" and that said letter merely submitted grievance 71-8 to Arbitrator Lazar. The Tenth Circuit held that the failure to submit grievance 72-1 was a fundamental defect — i.e., it was a defect of jurisdictional nature in the arbitrator's authority to consider grievance 72-1. Thus, the Tenth Circuit found that the arbitrator exceeded his authority in hearing grievance 72-1 and that the stage for application of the procedual-substantive test of *Wiley*, *supra*, had not been reached.

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## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Conflicts With The Decision Of The Eighth Circuit Court of Appeals Concerning The Arbitrator's Authority To Consolidate Grievances Which Is The Leading Decision In This Specific Area.

The decision below conflicts with the leading case on the arbitrator's authority to consolidate grievances, *Aron Products, Inc. v. United Auto Workers*, 386 F.2d 651 (8th Cir. 1967) in which the court concluded that consolidation of grievances is a procedural question within the authority of the arbitrator to decide. In *Aron, supra*, it was decided that the question of whether several unrelated grievances could be resolved in a single arbitration proceeding was a question for the arbitrator to decide since the collective bargaining agreement therein contained a broad arbitration clause (similar in all material respects to the one involved in the within case) which did not clearly specify that separate grievances must be heard individually. In *Aron, supra*, the court ruled the arbitrator must decide whether the grievances were to be resolved in single or multiple proceedings since it could not be said with *positive assurance* that the disputes must be submitted individually or in one proceeding. The court thereby adopted and applied the test of arbitrability established in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In this connection, the Court of Appeals held:

> "We believe that the decisions of the District Court cited above and of Judge Oliver in this case are sound and that the first arbitrator must determine whether the grievances are to be resolved in single or in multiple proceedings. The arbitration clause is not so clear that it can be said with *positive assurance* that disputes must be submitted individually, nor is it so clear that it can be said that the union has a right to insist on hearing all grievances in one proceeding.
>
> Nor do we express an opinion on the issue. The numerous decisions on this question by arbitrators adds

substance to our holding, however, that the issue is one to be decided by arbitration and not by the Courts." [emphasis supplied, footnotes omitted]

386 F.2d at p. 658-9

In *Avon, supra*, the Court of Appeals for the Eighth Circuit discussed several District Court opinions supporting the result which it reached, including: *Fitchburg Paper Co. v. MacDonald*, 242 F.Supp. 502 (D.Mass. 1965), *Teamsters v. Hess Oil & Chemical Corp.*, 226 F.Supp. 452 (D.N.J. 1964), and *Traylor Engineering & Mfg. Division v. United Steelworkers*, 220 F.Supp. 896 (E.D.Pa. 1963).

In *Fitchburg, supra*, it was held that the question of whether two different grievances (involving work assignment and job transfer) could be heard by one arbitrator in one proceeding was a procedural question for the arbitrator to decide and not the court since:

"The question is not whether these grievances shall be arbitrated or not, but only *how* the arbitration is to be conducted." [emphasis supplied]

242 F.Supp. at p. 505

In *Hess Oil, supra*, which involved an action to compel the joint arbitration of three grievances involving the assignment of overtime, it was held that the issue of whether multiple grievances could be heard by the same arbitrator at the same time was a question of procedure and is peculiar to the arbitrator to decide.

In *Traylor, supra*, the court decided that it wouldn't enjoin a multiple grievance arbitration before a single arbitrator until after another arbitrator in a separate arbitration proceeding pending at that time decided whether there was a right to consolidation. Thus, the court refused to enjoin the first arbitration until the second arbitration ("threshold grievance") was completed; thereby establishing that there was no obligation to grieve the issue of consolidation separately and prior to the arbitration proceeding involving the merits of the grievances in which consolidation was being attempted.

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The court held that the issue of whether the union's willingness to arbitrate the issue of the right to consolidate prior to arbitration of multiple grievances to one arbitrator is a dispute encompassed within the arbitration clause involved therein and was for the arbitrator to resolve.

Two other significant District Court decisions characterizing the issue of consolidation of multiple grievances in one arbitration proceeding as a procedural question for the arbitrator to determine include *American Sterilizer Co. v. Auto Workers*, 341 F. Supp. 522 (W.D.Pa. 1972) and *American Can Co. v. United Paper Makers*, 356 F.Supp. 495 (E.D.Pa. 1973). In *American Can, supra*, the court held:

> ". . . every court that has considered the issue whether multiple grievances may be heard before a single arbitrator has held that it is a *procedural* question to be left to the final disposition of the arbitrator." [citations omitted, emphasis supplied]
>
> 356 F.Supp. at p. 498

Similarly, the Fourth Court of Appeals in *Tobacco Workers v. Lorillard Corp.*, 448 F.2d 949 (4th Cir. 1971) cited and followed *Avon, supra*, by deciding that the question of whether a single "representative" grievance could be filed on behalf of a group of employees with identical separate grievances was for the arbitrator to decide. The above question in *Lorillard, supra*, is similar in all material respects to the instant case since, *inter alia*, the "representative" grievance involved therein was designed to accomplish the same purpose as "consolidation" of the two grievances in the instant case. Therefore, the Tenth Circuit decision below is also in conflict with the result reached in *Lorillard, supra*.

The decision below also conflicts with numerous decisions of the other Circuit Courts of Appeals in the area of the arbitrator's authority to decide procedural matters and in the area of judicial deference to arbitral authority, which conflicts are outlined under the following heading.

## II. The Decision Below Conflicts With Applicable Decisions Of The United States Supreme Court In The Area Of The Arbitrator's Authority To Decide Procedural Matters And In The Area Of Judicial Deference To Arbitral Authority.

The United States Supreme Court in the landmark case of *John Wiley & Sons v. Livingston, supra,* established the fundamental labor law principle that procedural questions which arise out of a dispute which is substantively arbitrable are for the arbitrator and not the court to determine. In *Wiley, supra,* the Supreme Court held in pertinent part:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."
>
> 376 U.S. at p. 557

In *Wiley, supra,* the question was presented as to whether there was a duty to arbitrate certain grievances which were substantively arbitrable but which were not processed in conformance with prior steps of the grievance and arbitration procedure. It was concluded that this question was a procedural question which should be left to the arbitrator. Similarly, in the instant case, grievances 71-8 and 72-1 were substantively arbitrable and the question raised by the Tenth Circuit was whether grievance 72-1 was correctly submitted to Arbitrator Lazar. That question is part of the consolidation dispute, all of which is a procedural question which must be left to the arbitrator.

In *Wiley, supra,* the Supreme Court provided guidance as to what constitutes a procedural question:

> "Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without con-

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sideration of the merits of the dispute which is presented for arbitration."

376 U.S. at p. 557

Clearly, the question of consolidation in the instant case involves such questions as "whether grievance procedures or some part of them apply to a particular dispute" and/or "whether such procedures have been followed or excused." The Tenth Circuit Court of Appeals recognized the distinction between questions of substantive and procedural arbitrability and the principle that questions of procedural arbitrability are for the arbitrator to resolve in accordance with *John Wiley, supra.* See, *UAW v. Folding Carrier Corp.*, 422 F.2d 47 (10th Cir. 1970), wherein it held that the "manner" in which a dispute is presented is a question of procedural arbitrability to be determined by the arbitrator. In *Folding Carrier, supra,* the union sued to compel arbitration of a grievance involving the failure of the employer to staff the plant with employees holding high seniority because the employer had rejected arbitration on the grounds the grievance was not presented in accordance with contractual provisions. The dispute in *Folding Carrier, supra,* was characterized as a question of procedural arbitrability to be decided by the arbitrator.

Since *John Wiley, supra,* the question of whether a grievance procedure has been adequately complied with has been uniformly held to be an issue for the arbitrator to decide. Several recent Circuit Court decisions applying this principle include *Bealmer v. Texaco, Inc.*, 427 F.2d 885 (9th Cir. 1970), *cert. denied* 500 U.S. 926 (1970); *I.A.M. v. Fraser & Johnston Co.*, 454 F.2d 88 (9th Cir. 1971), *cert. denied* 406 U.S. 920 (1972); *Technical Engineers v. Western Electric Co.*, 508 F.2d 106 (7th Cir. 1974); *Yellow Cab Co. v. Democratic Union,* 398 F.2d 735 (7th Cir. 1968); *Local 12934 of International Union, District 50, United Mine Workers of America v. Dow Corning Corp.*, 459 F.2d 221 (6th Cir. 1972); and *NF&M Corp. v. United Steelworkers of America,* ____ F.2d ____ , 90 LRRM 2947 (2d Cir. 1975).

The grievance and arbitration procedure in the instant case (See Appendix D) is very broad and contains no exclusionary language removing the issue of consolidation

from the grievance and arbitration procedure. As a result, the issue of consolidation, which involves the question of whether grievance 72-1 was properly submitted and in turn the question of whether or not the selection of a neutral arbitrator from the FMCS list provided for grievance 72-1 was required or was an unnecessary step in consolidation, is a matter for the arbitrator and not the court to decide. This principle is solidly established in *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972). *Flair, supra,* involved a suit by the union therein to compel arbitration under a "broad" arbitration clause of the issue of the binding effect of the contract and possible violations thereof where the defendant employer refused to arbitrate alleging the union was guilty of laches. The Supreme Court found that the contract contained a broad arbitration clause and since the clause applied to "any difference" and there was nothing to limit this language or to except the dispute from arbitration, it concluded that the issue of laches was included and was to be resolved by the arbitrator.

The function of the court in determining arbitrability is delineated in *Warrior & Gulf, supra.* There, the Supreme Court articulated the classic test for the determination of arbitrability:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> * * *
>
> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." [emphasis supplied]
>
> 363 U.S. at p. 582-3

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Thus, the continuing Supreme Court precedent cited above (that is, *Wilko, supra, Flair, supra,* and *Warrior & Gulf, supra*) compels the conclusion that the matter of consolidation presented here is included within the coverage of the broad arbitration clause and is, therefore, reserved for the arbitrator to resolve. Furthermore, since it is a procedural matter, it was properly heard by the arbitrator selected to decide the substantive issues involved.

Judicial review of the merits of an arbitration decision (on both procedural and substantive issues) is extremely limited and restricted. See, *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). A review of Arbitrator Lazar's decision on the question of consolidation (See Appendix C-7) clearly shows that it "draws its essence" from the collective bargaining agreement. Arbitrator Lazar discussed and construed the applicable contractual provisions and the construction thereof or "treatment" by the company and union in the grievance and arbitration stages together with the parties' conduct in processing grievances 71-8 and 72-1 as a "single question" and properly concluded they were united in accordance with the intent of the grievance procedure.

The policy of judicial deference to arbitral decisions on the merits has been followed in numerous decisions in the various Circuit Courts of Appeals: *Electrical Workers v. Peerless Pressed Metal Corp.*, 451 F.2d 19 (1st Cir. 1971); *United Automobile Workers v. American Machine and Foundry Co.*, 329 F.2d 147 (2d Cir. 1964); *Honold Mfg. Co. v. Fletcher*, 405 F.2d 1132 (3d Cir. 1969); *Local 103 v. RCA Corp.*, 516 F.2d 1336 (3d Cir. 1975); *Safeway Stores v. Bakery Workers*, 390 F.2d 79 (5th Cir. 1968); *United Steelworkers v. Timken Roller Bearing Co.*, 324 F.2d 738 (6th Cir. 1963); *Oil, Chemical and Atomic Workers v. Mobile Oil Co.*, 350 F.2d 708 (7th Cir. 1965); *Iowa Pork Co. v. Packing House & Dairy Workers*, 366 F.2d 275 (8th Cir. 1966); *Holly Sugar Corp. v. Distillery Workers*, 412 F.2d 899 (9th Cir. 1969); *Amalgamated Butcher Workers v. Capitol Packing Co.*, 413 F.2d 668 (10th Cir. 1969); *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 442 F.2d 1234 (D.C.C.A. 1971).

The Tenth Circuit Court of Appeals finds support for the result reached in the instant case in its own decision in *Retail Store Employees Union, Local 784 v. Sav-On Groceries*, 508 F.2d 500 (10th Cir. 1975). The Tenth Circuit cites *Sav-On, supra*, for the proposition that an arbitrator lacks authority to decide issues not submitted to arbitration – i.e., issues outside the "submission agreement." In *Sav-On, supra*, the court concluded that the arbitrator exceeded his authority by awarding back pay and forbidding assignment of heavy tasks which were clearly outside the express terms of the submission agreement which dealt only with whether or not a contractual violation occurred and not with the fashioning of a remedy.

The Tenth Circuit's decision in *Sav-On, supra*, is readily distinguishable from the instant case since here there was no submission agreement. In addition, there was no element of surprise over the matters arbitrated since the company was fully apprised of the union's position regarding consolidation prior to both arbitration hearings. Arbitrator Lazar did not intrude beyond areas marked out for arbitral authority as delineated by the collective bargaining agreement. Moreover, Company Arbitrator Allen's letter dated August 28, 1972 to Professor Lazar (Pl. Ex. 1) which the Tenth Circuit construed as the "submission" in fact submitted the issue of "overtime assignment" to Arbitrator Lazar in the form of a "united" grievance consisting of grievances 71-8 and 72-1. Consequently the reasoning in *Sav-On, supra*, is not applicable to the instant case. The opinion of the Fifth Circuit Court of Appeals in *United Steelworkers v. U.S. Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974) on the question of the scope of arbitral authority where challenged as beyond the grievance(s) submitted is more directly applicable than *Sav-On, supra*, to the instant case and supports the union's position herein.

### III. The Decision Below Imposes Undesirable Limitations On Arbitral Authority And Constitutes A Serious Interference With Our National Labor Policy Of Favoring The Resolution Of Labor Management Disputes Through Arbitration.

The decision below constitutes a serious threat of destruction to arbitration as a practical and peaceful means of

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resolving labor disputes. It introduces a technical legal concept, that is, "jurisdictional defect" or precise "pleading" requirements to limit arbitral authority by means of a single perfunctory, incidental correspondence to the arbitrator notifying him of his selection. This decision produces serious adverse consequences to the arbitral process and the national labor policy favoring peaceful resolutions of disputes through arbitration.

The Tenth Circuit in the instant case construed a single non-consequential correspondence, prepared by the company partial arbitrator (Pl. Ex. 1), notifying Arbitrator Lazar of his selection, to be a "submission agreement" with the effect of confining the limits of Arbitrator Lazar's authority to the single grievance 71-8 referred to therein. No such result can be supported by the broad language of the grievance and arbitration provisions (Appendix D) contained in the applicable labor agreement. The Tenth Circuit made this construction notwithstanding the fact that the issue of "overtime assignment" was specifically mentioned in said letter, which issue involved the second grievance ("72-1") as well as the first, and notwithstanding the fact that there was no evidence establishing that said letter was intended by the parties to be a "submission" agreement. The union did not sign the letter or intend for it to in any way limit the arbitrator's authority under the collective bargaining agreement.

Moreover, the Tenth Circuit overlooks the fact that even if the above letter constituted a submission, the arbitrator decided that it submitted a "united" or consolidated grievance. The Court also overlooked the inescapable conclusion that even if the letter was a type of submission, it was supplemented by the union's motion to consolidate and the company's initial agreement to a hearing on the motion. Where the issue is clearly arbitrable, as here, agreement to a hearing date before a particular arbitrator constitutes submission of the issue to him.

More importantly, however, the Tenth Circuit has, in the instant case, introduced the technical legal concept of a

"jurisdictional defect" into the area of arbitral authority by means of construing the above letter as a "pleading" even though it had doubtful status as a "submission." The introduction of the legal notion of a "jurisdictional defect" and "pleading" carves out and subtracts from arbitral authority a large, loosely defined exception to the procedural-substantive test of arbitrability developed in *Wiley, supra*. This is especially true here since there is no such obligation spelled out in the labor agreement. This area of exception will serve to complicate and restrict the application of the procedural-substantive test of arbitrability which has been so successful due to the ease with which it can be applied.

The Third Circuit Court of Appeals in *Food Workers v. A & P Tea Co.*, 415 F.2d 185 (3d Cir. 1969) recognized the danger of introducing a hyper-technical theory of pleading in evaluating the scope of a submission to arbitration and rejected this type of approach. In this connection, the court stated as follows:

> "Courts have deferred to arbitration as a practical and peacable means of resolving labor disputes. But much of the value of arbitration in this regard will be destroyed if the arbitrator is refused to consider the merits of a grievance based upon a hyper-technical theory of 'pleading' — one that seizes upon random correspondence of the parties as rigidly stating their formal positions. Such a system of 'pleading' by discouraging negotiation and discussion between the parties, would certainly not promote industrial peace — one of the primary aims of federal labor law."
>
> 415 F.2d at p. 189-190

The limits to Arbitrator Lazar's authority in the instant case are defined by the applicable collective bargaining agreement and not by a single incidental correspondence which was not intended by the parties to set out the limits of arbitral authority in this case. A dispute arose in this case over whether grievance 72-1 was submitted to Arbitrator Lazar or, more appropriately, a dispute arose over whether grievance 72-1 could be consolidated with grievance 71-8 before

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Arbitrator Lazar. Under the broad grievance and arbitration procedure applicable (See Appendix D), this dispute was for Arbitrator Lazar to resolve and this was done through the conduct of a separate hearing for this purpose which took place on September 27, 1972. Arbitrator Lazar's award which resulted, granting the union's motion to consolidate, drew its essence from the collective bargaining agreement and is enforceable in accordance with the applicable standards of arbitral authority and judicial deference to arbitration.

The company failed to raise the defense of lack of submission of grievance 72-1 to the arbitrator, despite ample opportunity to do so. The first time the defense was asserted was in the courts after the company had refused to comply with the award. The raising of this defense after the conclusion of the arbitration undercuts the finality, and, therefore, the usefulness of arbitration as an expeditious and generally fair method of settling disputes and has been improperly sanctioned by the Tenth Circuit in the decision below. The company's failure to raise this defense before the arbitrator should operate as a bar and waiver of its assertion herein. See, *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 367 F. Supp. 917 (D.C.D.C. 1973); *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 442 F.2d 1234 (D.C. Cir. 1971); and *Mogge v. District 8, I.A.M.*, 454 F.2d 510 (7th Cir. 1971).

An adverse effect of the Tenth Circuit decision in the instant case will be to cause delay and expense to the arbitral process which the Supreme Court in *Wiley, supra*, recognized as contrary to the aims of national labor policy. (See, 376 U.S. at p. 558). This decision will cause parties to collective bargaining agreements to consult with lawyers in the drafting of all correspondence associated with the arbitral process to protect against limited, inadvertent, or unwanted submissions.

Also, it will make consolidation of grievances far more difficult and more expensive to achieve. As a consequence of the Tenth Circuit decision below, a party to a collective bargaining agreement with a broad arbitration clause which is silent on consolidation could block consolidation by merely

refusing to "submit" two grievances to the same arbitrator. The Party desiring consolidation will then be required to go to court to compel arbitration of the consolidation issue, notwithstanding the fact that the issue of consolidation under these circumstances is clearly arbitrable. Delay and increased expense will result, thereby frustrating the use of the arbitral process for effective dispute resolution.

Furthermore, it is clear that it would be impractical and practically impossible to treat consolidation as a totally separate grievance and such an approach would involve a wasteful duplicative effort. This is because the matter of consolidation could not be properly decided without reference to the specific grievances to be consolidated. That is, the degree of similarity, the time of occurrence, the contractual provisions involved, the conduct of the parties relating to the handling of the grievances, and other considerations deriving from the nature of the grievances to be consolidated must be reviewed in order to make a determination on the question of consolidation.

Consolidation serves an extremely useful purpose consistent with national labor policy since it promotes the economic and expeditious resolution of grievances and prevents or minimizes the possibility of inconsistent determinations by different arbitrators of similar grievances.

For the arbitral process to work successfully, it must be efficient, economical and unburdened with legal technicalities. The Tenth Circuit decision in the instant case slows, adds greater expense, and complicates the use of the arbitral process in the resolution of labor disputes. It undesirably invites intransigence instead of promoting negotiation and the private settlement of labor issues which the District Court pointed out should not be encouraged.

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## CONCLUSION

For the reasons stated above, including the strong conflict of authority between the Tenth Circuit decision below with that of other Circuit Courts and of the Supreme Court, together with the important considerations of national labor policy discussed, the petition for writ of certiorari to review the decision of the Court below should be granted.

Respectfully submitted,

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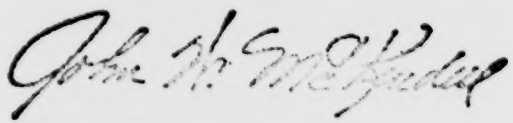
Telephone: (303) 572-8585

DATED: February 2, 1976

## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 1976 three copies of the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, were mailed, postage prepaid to Carl F. Eiberger and Russell Rowe, Attorneys at Law, 1600 Western Federal Savings Bldg., Denver, Colorado 80202, counsel for Respondent. I further certify that all parties required to be served have been serviced.



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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-4613

LOCAL UNION NO. 2-477, OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION,

Plaintiff

v.

CONTINENTAL OIL COMPANY, a Delaware corporation,

Defendant

Jonathan Wilderman, Law Offices of John W. McKendree, 1050 - 17th Street, Suite 1818, Denver, Colorado 80202, attorney for plaintiff; Russell P. Rowe and Carl F. Eiberger of Rovira, DeMuth & Eiberger, 1600 Western Federal Savings Building 718 17th Street, Denver, Colorado 80202, attorneys for defendant.

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### FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

MATSCH, Judge

The plaintiff and defendant are parties to a collective bargaining agreement which provides for a three step grievance procedure, the last step being a meeting of the refining department manager of operations or his appointee with a workmen's committee from the union. If the union is dissatisfied with the result, it may carry the matter to arbitration

by a written notice designating an arbitrator for the union. Upon the company's selection of its arbitrator, these two partial arbitrators are required to confer. If they fail to resolve the issue within five days after their first conference, the company must prepare a letter for joint application for a list of five arbitrators selected by the Federal Mediation and Conciliation Service. Upon receipt of that list the company and union arbitrators select a neutral arbitrator by alternately striking names. The contract then provides:

"3. . . . Thereafter the parties shall notify the arbitrator whose name is not eliminated of the precise issue to be arbitrated and of mutually acceptable dates and places for the holding of the arbitration.

4. As soon after his selection as is reasonably practicable the neutral arbitrator shall choose a date and place for hearing, and at such hearing both Company and the Union shall be permitted to have representatives present, and to present evidence and arguments to the neutral arbitrator. Each party shall have the privilege of cross-examining witnesses presented by the opposite party. The decision of the neutral arbitrator shall be rendered in writing in a decision stating reasons for the award within thirty days of the date of the hearing.

5. The only grievances which shall be arbitrable shall be those meeting the following conditions:

a. Grievances arising between the Union and the Company relating only to the interpretation or performance of this Agreement which cannot be adjusted by mutual agreement.

b. The grievance specifically designates the express provision or provisions of this Agreement alleged to have been violated, and the manner in which it or they have been violated.

6. The sole function of the neutral arbitrator shall be to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance. The arbitrator shall have no power or authority to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect."

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The contract defines the term "grievance" as "... complaints, disputes or claims of unfair treatment involving the application or interpretation of the terms of this Agreement."

On December 16, 1971, the union filed Grievance No. 71-8 for awarding overtime work out of classification. On January 20, 1972, the union filed Grievance No. 72-1 for awarding overtime work out of classification.

The grievance procedure was followed without success and on March 27, 1972, the union sent two separate letters to the company naming Mr. R. G. Steele as arbitrator for each of these grievances. Mr. C. S. Allen was named as the company arbitrator for each grievance. These two partial arbitrators met on April 27, 1972 together with Mr. Edwards who had been selected as union arbitrator on Grievance No. 72-2 for which Mr. Allen was the company's arbitrator. All three grievances were discussed by these three men. Within the required five day period Mr. Allen telephoned Mr. Steele to advise him of the company's proposal on the two grievances for which Mr. Steele was arbitrator and to ask Mr. Steele to pass on to Mr. Edwards information relating to Grievance No. 72-2.

On May 5, 1972, Mr. Allen wrote two separate letters to the Federal Mediation and Conciliation Service to request a list of arbitrators for Grievance No. 71-8 and No. 72-1. On May 23, 1972, that agency sent two separate lists of five persons for these grievances and these two lists had no names in common. The union then turned these matters over to an attorney who wrote to the company on June 1, 1972 to suggest that Grievances Nos. 71-8 and 72-1 be submitted to the same arbitrator. That suggestion was rejected by the company's reply of June 7, 1972 with the following counter proposal:

> "If the union is agreeable, the company will agree to waive the time limitations on Grievance 72-1, thereby deferring arbitration until an opinion and decision on Grievance 71-8 has been rendered by an impartial arbitrator. At that time, both parties could decide on the future disposition of Grievance 72-1."

In his letter of July 18, 1972, the union's attorney agreed "to waive the time limits on grievance 72-1." The two partial arbitrators then talked by telephone to choose an arbitrator for Grievance No. 71-8 resulting in the selection of Joseph Lazar, a member of the faculty of the University of Colorado. He was notified of this selection by letter of August 28, 1972 and the date of October 3, 1972 was agreed upon for the arbitration hearing.

On September 12, 1972, the union submitted a motion to consolidate Grievances Nos. 71-8 and 72-1, alleging an identity of issues and asserting that the company had agreed to consolidate. Professor Lazar then arranged the date of September 27, 1972 for a hearing on the motion to consolidate. Both the company and the union agreed to that date; however, on September 15, 1972, William E. Elliott, as counsel for the company wrote a letter to the neutral arbitrator to advise that the company had not agreed to a consolidation and to contend that the arbitrator had no authority to grant the union's motion because the contract had no provision for such a consolidation. Neither the company's arbitrator nor any other representative of the company appeared at the hearing on September 27, 1972 but union members did appear and submit evidence and argument.

Professor Lazar gave his decision by a telegram to the parties on the night of September 27, 1972. He found that they had conferred on both matters together during the steps of the grievance procedure and had thereby made a practical construction of the contract. Accordingly he granted the motion to consolidate.

Because of that ruling the company refused to participate in the arbitration hearing held on October 3, 1972. The union did appear, evidence was taken on both grievances and Professor Lazar made an award under date of November 2, 1972 on both grievances. The company has refused to make the payments required by that award, contending that the arbitration was a nullity because the arbitrator acted beyond his authority in considering both grievances. Thus, these two small, routine grievances were exacerbated into a quarrel over a matter of principle.

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The partial arbitrators never did the striking of names from the list provided for Grievance No. 72-1 and at no time did the union file a separate grievance for the company's refusal to agree to consolidate or for the company's failure to participate in the hearings of September 27, 1972 and October 3, 1972. It is clear from the record that the company made a conscious, knowing and deliberate decision to refuse to appear at those two hearings.

The evidence does not support the company's contention that there was an express agreement to submit these grievances separately. The exchange of correspondence between the lawyer for the union and the company's arbitrator, Mr. Allen, does not reflect any clear meeting of minds, even if it is assumed that the attorney had the authority to make an agreement binding upon the union. The collective bargaining contract does not set a time limit on the selection of a neutral arbitrator and it is therefore difficult to comprehend what could have been intended by the language relative to agreeing to waive the time limits on Grievance No. 72-1. The most that can be said for these letters is that they expressed an intention to agree at some time in the future on the disposition of that grievance. The filing of the motion to consolidate was a change of apparent intention; but it was not a violation of any enforceable agreement.

In *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) the Supreme Court established the principle that once it is determined that the parties are obligated to submit a dispute to arbitration questions growing out of that dispute which are procedural in nature should be decided by the arbitrator.

The question of consolidation of grievances for hearing was characterized as procedural in *Avon Products, Inc. v. United Auto Workers*, 386 F.2d 651 (8th Cir. 1967). There the company had refused to select an arbitrator for each of five grievances. The matter went to court before any arbitration hearing and the court ordered that the grievances must be submitted to arbitration with a direction that the first arbitrator selected should consider the issue of a consolidated hearing. Thus, the arbitrator was given authority by the court's order.

*Fitchburg Paper v. MacDonald*, 242 F. Supp. 502 (D. Mass. 1965) was a case in which the company brought suit to obtain a declaration that the issues there involved could not be consolidated for hearing. The court declared it to be the duty of the parties to proceed to arbitration according to the union's request for a single arbitration and reserving the company's right to raise the question of the propriety of consolidation for decision by the arbitrator.

Judicial interference with collective bargaining should be minimized. Public policy clearly favors compromise and conciliation by the parties themselves as the preferred method of resolving disputes between labor and management. Accordingly, when that process fails, the courts should try to reduce the issue into the narrowest possible focus. It is not helpful to try to apply the generalization that consolidation is procedural and therefore automatically within the authority of the arbitrator to decide. The adoption of such a conclusion creates more questions than it answers. If there are multiple grievances before multiple arbitrators which of them has the authority to act to consolidate? What criteria are to be applied to consolidation? What remedy is there for an outrageous abuse of this presumed authority to decide conclusively on "procedural" matters?

Labor arbitration is a private system of adjudication created and existing only by contract. It should not become encrusted with a set of common law principles forced upon it by the courts or by those who act as arbitrators. The freedom of the parties to change their contract, to give it practical construction by conduct or by specific agreement and to compromise a given grievance must be preserved.

In the present case an impasse resulted from the petulance of both parties. After failing to obtain an agreement to consolidate, the union turned legalistic and tried to force the matter by filing a "motion" with the arbitrator selected for a single grievance. Obviously angered at that attempted avoidance of the issue of arbitral authority, the company simply refused to proceed and it now contends that it can ignore the result.

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There can be no doubt that Professor Lazar was properly selected to decide Grievance No. 71-8. His award on that grievance must be enforced. The arbitrator's decision to consider Grievance No. 72-1 is questionable. His conclusion was that the parties had made a practical construction of the contract by considering these matters together during the stages of the grievance procedure. The evidence presented before this Court could lead to a different conclusion; but the company failed to assist the arbitrator and it should not now be permitted to frustrate the entire process by asserting error upon the basis of evidence not made available to the arbitrator. To justify that position on the basis of a lack of "jurisdiction" is as unhelpful as to apply the "procedural" question label.

In my view the fairest resolution of this case is to preclude the company from denying the authority of the arbitrator to act on Grievance No. 72-1 upon the basis of a waiver of its objections by the deliberate refusal to appear at the hearings on September 27, 1972 and October 3, 1972. To do otherwise would be to invite intransigence instead of promoting private settlement of labor issues.

Accordingly it is

ORDERED that the defendant is directed to comply with the award of Arbitrator Joseph Lazar, dated November 2, 1972 and that the plaintiff shall recover its costs herein.

Done at Denver, Colorado, this 25th day of November, 1974.

BY THE COURT:

s/Richard P. Matsch
Richard P. Matsch, Judge
United States District Court

**APPENDIX B**

**PUBLISH**

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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No. 75-1084

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|---|---|
| LOCAL UNION NO. 2-477, OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, Appellee, v. CONTINENTAL OIL COMPANY, Appellant. | Appeal From The United States District Court For The District of Colorado (D.C. #C-4613) |

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Carl F. Eiberger, of Rovira, DeMuth & Eiberger, Denver, Colorado (Russell P. Rowe, Denver, Colorado, and William E. Elliott, and Thomas D. Montgomery, Houston, Texas, of Counsel, with him on the Brief), for Appellant.

Jonathan Wilderman, Law Offices of John W. McKendree, Denver, Colorado, for Appellee.

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Before PICKETT, SETH and McWILLIAMS, Circuit Judges.

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SETH, Circuit Judge.

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This action is to enforce, pursuant to 29 U.S.C. §301(a), an arbitration award based on grievances arising under a labor contract in force between the Union and Continental Oil Company. The problem concerns what began as two separate grievances, No. 71-8 dated December 16, 1971, and No. 72-1 dated January 20, 1972; and especially their consolidation by the arbitrator. Both grievances arose from overtime outside of job classifications and require the interpretation of contract provisions. Both raised matters subject to arbitration under the contract.

The contract grievance procedure provided for initial talks about the problem with three stages of management starting with the foreman. If the Union was dissatisfied with the results of these discussions, it could then give notice that it desired to use the formal arbitration procedure provided separately in the contract. This was the selection of an arbitrator by each of the parties, and if followed by a failure to so resolve the question, resort then would be had to a neutral arbitrator selected by the partial arbitrators from lists provided by the Federal Mediation and Conciliation Service. The matter progressed to the selection of an arbitrator from a Federal Mediation list submitted for No. 71-8, and Professor Joseph Lazar was selected as the neutral arbitrator. No selection was made from the separate list provided for No. 72-1. The contract states in Article V that the "parties" shall "notify" the neutral arbitrator " . . . of the precise issue to be arbitrated." The neutral arbitrator was only to interpret and apply provisions of the labor contract.

The basic issue raised by Conoco in the action to enforce, and on appeal, is whether the two grievances could be consolidated by Professor Lazar for hearing and determination as he did. The consolidation was on the motion of the Union to do so, filed shortly after the submission. This was resisted by the company. A letter was sent to the arbitrator objecting to consolidation, but the company refused to appear at the hearing on the motion. The issue arose also in the trial on the Union's motion for summary judgment. The trial court found for the Union on this issue, and upon others raised by Conoco's motions. Conoco has taken this appeal.

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When the stage for arbitration by a single neutral arbitrator was reached under the contract terms, the company representative asked the Federal Mediation Service to provide a list of names from which the neutral arbitrator would be selected. A list was requested for Grievance 71-8 and a separate list for Grievance 72-1. Two separate lists were received in response. The parties then selected a name from the 71-8 list, and this was Professor Lazar. The 72-1 list (Exhibit N) was not used.

Under the contract provisions for arbitration by a single neutral arbitrator, it was the duty of the "parties" to notify the person selected from the Federal Mediation Service list. The provision in part states that when a name is selected: "Thereafter the parties shall notify the arbitrator whose name is not eliminated of the precise issue to be arbitrated and of mutually acceptable dates and places for the holding of the arbitration." This was done by a letter dated August 28, 1972, sent by Mr. C. S. Allen, the Company representative, to Professor Joseph Lazar, with copies to Mr. Steele, the Union representative. This letter referred only to Grievance 71-8, and it read:

"Dear Professor Lazar:

"You have been selected to arbitrate grievance 71-8, a dispute between Continental Oil Company Refinery in Denver and Local 2-477 OCAW International Union which represents the employees. The grievance is concerned with overtime assignment.

"Please advise the parties the dates you are available to hear this grievance. Due to another committment [sic], the week of September 25 would not be acceptable.

"Mr. R. G. Steele, Representative
OCAW XV Local 2-477
6473 Reed Court
Arvada, Colorado 80002

"Mr. C. S. Allen
Continental Oil Company

P. O. Box 2548
Billings, Montana 59103

"C. S. Allen
Director of Personnel Relations
Billings Refinery."

Professor Lazar received the letter, Exhibit P-1, and testified concerning it. He stated that it was a "letter of appointment" requesting him to arbitrate. He stated that he accepted the appointment to arbitrate Grievance 71-8. He was asked whether the hearing date was only for the one grievance, and he answered: "Whatever the grievance was. That was the hearing date I set up. It was 71-8 as identified." The witness also identified Exhibit P-2 referring to the date for 71-8. Professor Lazar testified that until he received the Union motion to consolidate the two grievances, he did not know of any other grievances that he might be involved with.

The witness, Mr. Steele, who was the Union representative at the preliminary arbitration, testified that the letter to Professor Lazar (Exhibit P-1) referred only to Grievance 71-8 and that he did not know "what happened" to 72-1.

Under the record, the submission was by the letter from Mr. Allen, Exhibit P-1. This was apparently regarded as being in conformity with the contract. Grievance 71-8 had been clearly identified and had been formally filed by the Union and the employee concerned. There is no issue as to the specificity of the reference to the grievance by number.

The record is thus clear that the only list of names used for selection of a neutral arbitrator was that for Grievance 71-8. A name was selected from it, and this person was notified, pursuant to the contract, of his "appointment," and of the issue to be arbitrated – Grievance 71-8. There was no confusion, uncertainty, or dissent evidenced in the record to the steps so taken. The submission, under these circumstances, was of 71-8 and that grievance alone. This was the only one that the arbitrator knew of when he accepted. Grievance 72-1 was not submitted by the parties.

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Professor Lazar, after hearing the motion to consolidate, at which hearing the company refused to appear, decided that there had been an agreement to consolidate the two or at least to have them heard together, and he so ordered consolidation. The trial judge however found that there was no binding agreement to have the two grievances heard together arising from the conversations or correspondence. This finding is supported by substantial evidence. The trial court held there was no meeting of the minds, and thus handled the issue as a legal one to be determined by the procedural-substantive nature of the consolidation issue as presented to the arbitrator. The trial court said: "The arbitrator's decision to consider Grievance 72-1 is questionable." As mentioned, the trial court then considered the procedural versus substantive opinions applicable when a case has been correctly submitted. We must hold that the trial court was in error in so doing.

The trial court also noted that Conoco did nothing to assist the arbitrator in deciding the problem in that it did not appear at the hearing, and did not come forward with facts bearing on the question whether there was an agreement to submit both, nor as to what was actually submitted. We agree that the decision by Conoco not to appear at the arbitrator's hearing on consolidation was indicative of an attitude not to be helpful in resolving the problem. We might add that its refusal to appear in the hearing by the arbitrator on the merits may also be so characterized.

The trial court in evaluating the issue of consolidation under the procedural-substantive tests was in error because there existed a more fundamental defect. This was a failure to submit Grievance 72-1 to arbitration at all. As demonstrated above, the record is clear that only Grievance 71-8 was submitted for arbitration by the parties, and 72-1 could not be added by a party unilaterally nor by the arbitrator. It was a defect of jurisdictional nature in the arbitrator's authority to consider 72-1. It would seem sufficient in deciding this point to refer to the opinion of this court in Retail Store Employees Union Local 782 v. Sav-On Groceries, 508 F.2d 500 (10th Cir.), wherein the arbitrator undertook to decide

issues not submitted for arbitration, that is, issues outside the "submission agreement." In the case before us, the arbitrator likewise exceeded his authority in hearing Grievance 72-1 which had not been submitted at all despite the previous consideration of both grievances by the parties in their preliminary attempts to decide the grievances. The matter thus never reached the stage considered by the Court in John Wiley & Sons v. Livingston, 376 U.S. 543, and related cases.

The record is equally clear that 71-8 was properly submitted to the arbitrator, hearings were held, and an award made as to it. There is no defect in this award, under the record before us. If Conoco chose not to attend the hearings on the motion or on the merits, this was their prerogative. No. 71-8 was properly being considered, and the fact that another grievance was also being examined over which the arbitrator had no authority makes no difference. An appearance could properly have been made in all hearings with a reservation of the submission issue as to No. 72-1.

The action of the trial court in enforcing the award of the arbitrator on Grievance 71-8 is affirmed, and his enforcement of Grievance 72-1 is reversed. The case is remanded for such further proceedings as the trial court deems necessary in accordance herewith.

## APPENDIX C

Professor Joseph Lazar, Arbitrator

| | | |
|---|---|---|
| IN THE MATTER OF ARBITRATION | ) | |
| | ) | |
| between | ) | |
| | ) | GRIEVANCES 71-8 |
| CONTINENTAL OIL COMPANY | ) | and 72-1 |
| | ) | Assignment of |
| and | ) | Overtime |
| | ) | |
| OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION Local 2-477 | ) | |

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Pursuant to the provisions of the Collective Bargaining Agreement between the Parties effective January 1, 1971, Denver Refinery, the undersigned was designated to arbitrate grievance 71-8 (letter of August 28, 1972, signed by C. S. Allen). Hearing for this grievance 71-8 was set with the Parties at 10:00 a.m., October 3, 1972, at the Ramada Airport No. 2 Inn, 6090 Smith Road, Denver, Colorado. By letter dated September 12, 1972, the Union submitted to the Arbitrator its motion to consolidate grievance 71-8 with 72-1 for hearing and award, and stated that it would "be pleased to present evidence and arguments in support of its motion either at the hearing now scheduled for October 3, 1972, or in advance thereof, at such time and place as designated." On September 25, the Arbitrator arranged with both Parties for a special meeting, on September 27, 1972, to deal solely with the Union's motion. This special meeting was to take into account the Union's motion as well as the Company's letter of September 15, 1972 to the Arbitrator objecting to the

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Pl. Ex. 14

motion. Later, on September 26, 1972, the Company sent a telegram to the Arbitrator, stating:

> Upon further consideration of your request to hear argument on the issue of consolidation of the captioned grievance 71-8 and 72-1 I must now advise you that it is the position of Continental Oil Company that the issue of consolidation of grievances for hearing is not within your authority as Arbitrator. You are hereby advised that Continental will not participate in your proposed oral argument on September 27, 1972 on the issue of consolidation. You are further advised that if in the event you should consolidate these grievances Continental will not participate in the arbitration resulting from such consolidation and Further that Continental will not abide by any award which might be the result of such arbitration hearing of consolidated grievances. William E. Elliott. Attorney for Continental Oil Company."

The Union, on September 26, sent a telegram to the Arbitrator, stating:

> The Union is in receipt of Tlx from Company Attorney. Company's stated position is in breach of contract. The Union will appear at 1:30 pM, o/27/72 at Ramada Inn 6090 Smith Rd. to present its arguments for consolidation. Whether or not Company appears, the Union looks forward to meeting with you tomorrow.

Oral argument was held on the Union's motion to consolidate at 1:45 p.m., September 27, 1972, at the Ramada Inn. The Company did not appear. Appearing for the Union were: Mr. Dan C. Edwards, International Representative, Oil Chemical and Atomic Workers International Union, AFL-CIO; and Mr. Robert G. Steele, Arbitrator for the Union. Later on September 27, as set forth below, the Arbitrator sent a telegram to the Parties advising them that "The motion of the Union to consolidate Grievance 71-8 with 72-1 for hearing and award is hereby granted." On October 3, 1972, hearing was held at 10:25 a.m. and continuing until 2:45 p.m. at the

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Ramada Inn on Grievances 71-8 and 72-1. The Company did not appear. Appearing for the Union were: Mr. R. L. Marsh, International Representative; Mr. Dan C. Edwards; Mr. Robert Jay Abbott, Chairman, Workman's Committee Continental Oil Co. Local 2-477; and Mr. Robert G. Steele. The Union called the Arbitrator's attention to Article V (Arbitration Procedure) of the Contract, reading in part: "7. The decision of the neutral arbitrator shall be final and binding upon both parties signatory hereto. . ." and construed by past practice as to making binding awards issued by the neutral arbitrator alone. Testimony was taken under oath, exhibits were checked against original copies, and the Arbitrator attempted to his best ability, in the absence of the Company, to assure the objectivity of the hearing. At the conclusion of the hearing on October 3, 1972, the Arbitrator sent a telegram to the Company advising them of further opportunity to submit briefs and to answer the brief of Union. On October 20, 1972, the Arbitrator forwarded to the Company the Union's brief, and on October 26, 1972, the Company wrote the Arbitrator:

"Re: Grievance 71-8
Denver Refinery

Dear Sir:

This is to advise you that the Company does not intend to file an answer to the Union's brief in the above captioned case.

Very truly yours,
William E. Elliott"

In the light of the recitals stated, the Arbitrator will set forth below his ruling on the motion to consolidate and his determinations on the substance of Grievance 71-8 and Grievance 72-1.

**********

1. **Concerning the Union's Motion to Consolidate Grievance 71-8 with 72-1 for Hearing and Award.**

The Union, in support of its motion, argued: that "Grievance number 72-1, filed by Mr. Larry L. Osborne,

concerns the identical issues, both legally, factually and contractually as grievance number 71-8; grievance number 72-1 reached the arbitration stage at the same time as grievance number 71-8; the issues presented in grievance number 72-1 are identical with the issues presented in grievance number 71-8; and the company has agreed to consolidate and join grievance 71-8 with grievance 72-1, but now unjustly refuses to continue with consolidation and joinder***". The Union further argues: "On May 5, 1972, these two grievances reached the arbitration stage; the Articles of Agreement between the parties does not clearly and unambiguously prohibit consolidation; the parties intended the grievance and arbitration machinery to be efficient and expeditious; and as a consequence, the grievance and arbitration mandates joinder and consolidation." Further, the Union argued: "The weight of arbitral opinion is that simultaneous arbitration of all grievances which reach the arbitration stage at the same time can be compelled by either party unless the arbitration clause of the collective bargaining agreement clearly and unambiguously provides otherwise. (citing 27 LA 586, 25 LA 171, 20 LA 441, 13 LA 678, 12 LA 305, 12 LA 446, and other arbitration awards). "The policy in favor of simultaneous arbitration is that the arbitration of multiple grievances is reflective of 'the best ideals of the whole arbitration process, which are devoted to efficiency, expeditious disposition and economy.' 12 LA 305, 306."

The Company, in objecting to the Union's motion, in its letter of September 15, 1972, to the Arbitrator, argued:

> The applicable collective bargaining agreement contains no provision for the consolidation of grievances for hearing. The arbitration procedure is stated in Article V. Section 6 of that Article delineates and limits the authority of the arbitrator. Section 6 provides as follows:
>
> > The sole function of the neutral arbitrator shall be to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance. The arbitrator shall have no power or

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> authority to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect.

The Union's Motion calls upon the arbitrator to act in a manner expressly proscribed by the collective bargaining agreement. The action called for would necessarily require a change, amendment, modification, supplement, filling in, or alteration of the collective bargaining agreement because there is no contractual provision for the consolidation of grievances.

It is apparent from the Unions' Motion that the parties are not in agreement concerning the consolidation of two grievances. Absent mutual agreement the contract cannot be altered during its term.

The assertion in the Unions' Motion that the Company had at one time agreed to consolidation is untrue. The fact that the two grievances were referred to in a common letter does not constitute an agreement to consolidate the grievances for hearing. The Company has maintained a long standing policy of opposition to the consolidation of grievances for hearing and did not deviate from that policy in the instant case. The Company hereby restates its opposition to the consolidation of grievances 71-8 and 72-1 for hearing.

I urge that the Arbitrator dismiss the Union's Motion without further hearing because the action sought by such Motion is not within the authority of the Arbitrator.

Attached to the Union's Motion, in factual support for its assertions, and indirectly alluded to by the Company, were Exhibits A, B, C, D, and E, included in the Appendix to this Award.

Contractual provisions material to consideration of the Union's motion are: Article IV, Section 2c; Article V, Sections 1, 2, 5, and 6. These read:

Article IV, Section 2c: "If the employee fails to obtain satisfaction through the foregoing, he may, through his Union representative, appeal the grievance to the Refining Department Manager of Operations or his appointee from outside the refinery within fifteen days of the written decision by the Company representative locally in charge, and request a meeting with the Workmen's Committee to confer about the grievance. In this appeal the matter is to be handled with the least possible delay, but in not more than 30 days, excluding day of receipt of such written appeal.

Article V, Section 1: "If the Union is dissatisfied with the decision as provided in Section 2c of Article IV, Grievance Procedure, or if a decision is not rendered within the time limit specified therein, the Union may within forty-five days from the date of such decision, or the expiration of time to render such decision, give the Refining Department Manager of Operations and the Refinery Manager written notice of its desire to carry the matter to arbitration. Said written notice shall designate the Arbitrator for the Union and shall be signed by the Chairman of the Workmen's Committee.

Article V, Section 2: "Within ten days following receipt of the Union's request for arbitration the Company shall notify the Union of the name of the arbitrator selected by it. The two arbitrators so named shall confer within ten days following such notification and attempt to resolve the question. If the two arbitrators cannot resolve the question within five days following the date of their first conference, the Company will prepare a letter for joint application to the Federal Mediation and Conciliation Service, requesting that a list of five arbitrators be furnished.

Article V, Section 5. "The only grievances which shall be arbitrable shall be those meeting the following conditions:

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a. Grievances arising between the Union and the Company relating only to the interpretation or performance of this Agreement which cannot be adjusted by mutual agreement.

b. The grievance specifically designates the express provision or provisions of this Agreement alleged to have been violated, and the manner in which it or they have been violated.

Article V, Section 6. "The sole function of the neutral arbitrator shall be to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance. The arbitrator shall have no power or authority to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect.

The Arbitrator granted the Union's motion in telegram to the Parties on September 27, 1972, as follows:

Concerning Union's Motion to Consolidate Grievance 71-8 with 72-1 for Hearing and Award.

Section 6, Article V of Agreement vests authority in this Arbitrator "to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance." Necessarily he must interpret and apply the additional language of Section 6 providing that "The Arbitrator shall have no power to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect." It is this last language which the Company contends denies the authority of this Arbitrator to grant the motion of the Union and justifies the Company's deliberate refusal to participate in the scheduled oral argument on the motion and justifies the Company's deliberate refusal to participate in the arbitration resulting from such possible consolidation and justifies the Company's deliberate refusal to abide by any award which might be the result of such arbitration of consolidated grievances.

This Arbitrator regrets that the Company refused to participate in the oral argument held as scheduled on

September 27 and made no effort to assist in the interpretation and application of the Agreements.

In addition to the language noted, this Arbitrator must also give interpretation and application to other provisions of Article V.

Section 1 speaks of "The decision as provided in Section 2c of Article IV," and refers several times to the "decision" and the Union's "desire to carry the matter to Arbitration." The Company's letter of Feb. 17, 1972 is "in answer to grievances 71-8 and 72-1" and has a single decision to "deny both grievances."

The Company's letter of April 12, 1972 states that "Mr. Cooper S. Allen, Director of Personnel Relations in our Billings Refinery, will serve as the Company Arbitrator and is prepared to meet with Mr. Steele on Numbers 71-8 and 72-1." This letter is a practical construction of Section one language and of Section two language calling for submission of the "decision" in both 71-8 and 72-1 to arbitration. The Company Arbitrator and the Union Arbitrator did "attempt to resolve the question." (Letter to Company Arbitrator Allen May 10, 1972, by Union Arbitrator Steele)

The evidence is clear and beyond doubt that 71-8 and 72-1 were treated by Company and Union as a single question in their grievance procedures and in their handling in the stage one phase of arbitration. Such handling, in the studied interpretation of this Agreement by the Arbitrator, in no way operated "to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect." The Parties practically construed Article V as allowing a single "decision" on the same "question" which was "the matter" carried to arbitration. Having so construed and applied the Agreement provisions so as to unite 71-8 and 72-1, without conflict or inconsistency insofar as Sections 1, 2, and 6 are concerned, it is this Arbitrator's judgment that the Parties themselves did not intend or construe the language of Article V, Section 6 as prohibiting the uniting of grievances. Accordingly, this Arbitrator interprets Article V, Section 6 as being consistent and in harmony with the provisions of Article V, Sections 1 and 2 as interpreted and applied by the Parties. Section 6,

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Article V, last sentence, construed in the context of the first sentence and in the light of the practical construction given by the Parties to Article V, Section 1 and 2 in the instant matter, does not deny the authority of this Arbitrator to grant the Union's motion. This result is consistent with the long line of considered decisions cited and quoted by the Union in its motion. The motion of the Union to consolidate grievance 71-8 with 72-1 for hearing and award is hereby granted.

**********

2. **Grievance 71-8.**

The Complaint or Grievance Report in Grievance No. 71-8, dated December 16, 1971, states in part:

> On December 10, 1971 Mr. Frank Bianco gave four hours of overtime to John Winfrey, who at that time was an G.R.P. Controlman. The overtime occured in the Crude Unit Controlman classification and Larry Osborne was the only Crude Unit Controlman available even though he had worked 12 hours, he still should have been asked if he wanted to stay for the additional four hours.
>
> The Union feels that the Company has violated Article VI Section 2 and Paragraph a, Article 9 Section 14, and/or any other Articles which might apply in the Articles of Agreement between Continental Oil Company and Oil Chemical and Atomic Workers International Union and that the employee should be paid four hours overtime at doubletime rate as the overtime would have been in excess of 12 hours.

**Contract Provisions**

Article VI, Section 2 a.

> "2. All work peculiar to any classified employment (job) shall be done by men regularly assigned to that classification (job) except that:
>
> a. The Company and Union recognize the necessity and desirability of maintaining skills

developed through crafts and operating classifications, and agree that assignments of work will be within the classifications in which an employee is working except in cases of emergency or when an employee to whom such work would be assigned cannot be reached to perform the work."

Article IX, Section 14.

"14. **Overtime Board** – In order to insure a fair and equal distribution of callout time worked by employees, the employees in each craft shall be asked if they desire to work such overtime. Those who signify their desire to work overtime shall have their names posted on the Overtime Board in order of their seniority. Then the oldest employee in point of seniority shall be assigned to work the first overtime necessary in his craft, the next oldest in order of seniority, and on through the list of employees. When the oldest employee in point of seniority has worked one overtime assignment his name shall be placed at the bottom of the list for assignment to overtime work and shall not again be eligible for an overtime assignment until all others have received an overtime assignment. It is the spirit and intent of this Article that employees will work overtime in rotating order of seniority but nothing in it shall curtail the Company's right to use the most suitable or readily available employee in emergencies regardless of overtime status. It is understood that in an emergency the Company may require any or all employees to work overtime, and employees shall not fail to perform such overtime work unless excused by the Company."

Article IX, Section 13.

"13. "**Emergency**" – An emergency as used in the terms of this Agreement applying to work or assignments is defined as a situation which constitutes a hazard to life or property."

Article IX, Section 3.

> ". . . the applicable rate for an employee shall be double the straight time rate in the following situations:
>
> a. For consecutive hours worked in excess of twelve (12)."

**Findings of Fact**

1. On December 10, 1971, Grievant Larry Osborne was in the classification of Crude Unit Controlman.

2. On December 10, 1971, Grievant had worked the first shift, from 12 midnight until 8 a.m., and had worked from 8 a.m. to 12 noon overtime, a total of 12 hours.

3. At 12 noon, when Grievant's relief did not show up for work, Grievant requested the opportunity to work overtime, from 12 noon to 4 p.m., which, if worked by Grievant, would have amounted to 16 hours on the job.

4. Grievant's request was rejected. Instead, the Company had Mr. John Winfrey, a Gas Recovery Plant Controlman, who was outside the classification of Crude Unit Controlman work, perform the overtime work.

5. In letter of December 22, 1971 to Mr. Osborne, the Grievant, Denver Refinery Manager R. B. Blomeyer states:

> ". . . In this grievance you asked for overtime for yourself. You were sent home after having worked 12 hours, and a man from another classification was called in to fill this position. . ."

6. The Company, in its written communications concerning Grievance 71-8, makes no contentions that an emergency situation existed.

**Positions of Parties**

This Arbitrator has attempted to formulate the Company's position as stated in its correspondence declining Grievance 7-18. In Company letter of December 22, 1971,

Manager Blomeyer states in part: ". . . It has been our practice over the years to call a man out in another classification if no one was available in the classification involved after a man has worked 12 hours . . . . We do feel that 12 hours a day is all any man should normally be expected to work and we do make efforts to avoid working beyond this point. It is our intent to continue this practice because, in all fairness to the people involved, we feel that plant safety, operating security, and a man's personal situation may be affected. For these reasons, this grievance is denied." The Company position is further stated in Manager of Operations Refining Department J. T. Zeien's letter of February 17, 1972, addressed to Mr. Abbott. He states: ". . . In my estimation, the significant factor involves past practice. Back through the years, it was agreed that overtime had been worked – both in and out of classification – twelve hours and over twelve hours, without a grievance. The significant point here is that a grievance was filed only after double time after twelve hours was negotiated into the last contract. Even since then, other instances of this nature have occurred with no grievance filed. It is apparent to me that the Union has historically allowed management to decide this point using such things as qualifications, safety, etc. to determine how overtime was filled. I agree that this is the way it should be and, therefore, support the procedures now in use at the plant and deny both grievances."

The Union position, briefly states, is that Article VI, Section 2, paragraph (a), providing that "The Company and the Union recognize the necessity and desirability of maintaining skills developed through crafts and Operating Classifications and agree that assignments of work will be within the classifications in which an employee is working except in cases of emergency or when an employee to who such work would be assigned cannot be reached to perform the work." is language which makes two exceptions, neither of which is applicable to the facts of the grievance, and is controlling. The Union argues that past practice cannot override the plain and clear terms of the language of the Agreement. In its brief, the Union further argues:

> The Union is hard-put to comprehend why the Company filled these vacancies in the manner that they

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did. Certainly, by so doing, they have violated Article VI, 2, (a). Even if a sixteen hour shift had been required, there is nothing in the agreement to prevent this. Union Exhibits 4a through 4j show that this has been done many times. The contract provides for double time after twelve hours so the parties must have intended that hours longer than twelve would have to be worked once in a while. The union does not mean to imply that a sixteen hour day is good. As a matter of fact, overtime per se is not a desirable thing for either party, but we all recognize that some overtime is necessary. Thank goodness sixteen hourdays are not a common occurrence. The Union submits that just because it is going to get more costly after a man has worked 12 hours, the company has no right to circumvent the Agreement in order to get the job done in a more convenient, or less costly manner. (Br. of Union, pp. 3-4).

**The Issue**

As stated by the Union, the issue is: "Did the Company violate the agreement by the manner in which they filled the crude unit controlman job vacancy from 12 o'clock noon until 4:00 P.M. on the day shift of December 10, 1971" and if the answer is in the affirmative, what is the proper remedy?

**Opinion of the Arbitrator**

There is no doubt in the mind of this Arbitrator that the Findings of Fact set forth above in Grievance 71-8 are correct even though the Company did not participate in the hearing. Sworn testimony and correspondence between the parties are entirely consistent and the findings of fact as stated are not subject to dispute, in the view of this Arbitrator. It is perfectly conceivable, however, that if the Company had participated, it might have developed additional facts pertaining to past practice, safety, and operating security. The Company deliberately chose, however, not to participate, and it is inappropriate for this Arbitrator to engage in conjecture on possible testimonies.

The language of Article VI, Section 2 is clear. "All work peculiar to any classified employment (job) shall be done by men regularly assigned to that classification (job) except that . . ." is language of command. It is imperative: "shall be done by men regularly assigned to that classification". This is certainly not permissive language, and it clearly contemplates "All work" not included in the language of exception. The language of exception is carefully specified: "except in cases of emergency or when an employee to whom such work would be assigned cannot be reached to perform the work." The clear specification of particular exceptions must necessarily be construed as intention to provide no other exceptions. If the Parties contemplated an exception where an employee had already worked twelve hours in line with the Company argument of past practice, it is obvious that no such exception is stated in the Article. No amount of practice contrary to the clear language of a written contract provision can prevail over the latter. See 48 LA 219; 48 1355. This Arbitrator is without the authority to write additional exceptions into the Articles of Agreement.

The wisdom or unwisdom of the Agreement provisions is for the Parties to consider, and not this Arbitrator. When the Parties clearly agree on double the straight time rate for consecutive hours worked in excess of twelve, and the record has instances of overtime beyond twelve hours, this Arbitrator must take for granted that the Parties contemplate overtime beyond twelve hours. Accordingly, Grievant's claim for overtime beyond twelve hours comes within the provisions adopted by the Parties.

**AWARD ON GRIEVANCE 71-8.**

1. The Company is in violation of Article VI, Section 2,a.

2. The Company shall pay to Grievant four hours overtime at double time rate.

**3. Grievance 72-1.**

The Complaint or Grievance Report in Grievance 72-1, dated January 20, 1972, states in part:

> On January 11, 1972 Mr. Leonard Brandt (Shift foreman Denver Refinery) gave eight hours overtime to Mr.

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Buddy Watkins, who at that time was working in the T.C.C. Classification. The overtime occurred in the crude Unit Classification, Mr. Larry Osborne, Mr. Don Kapus, Mr. Jay Hooper, and Mr. Jack Hindi, who were Crude Unit Controlmen should have been given this eight hours overtime.

The Union feels that the company has Violated Article VI Section 2 Paragraph a, and Article IX Section 14, and/or any other Articles which might apply in the Articles of Agreement between Continental Oil Company and the Oil Chemical and Atomic Workers International Union.

We believe that the eight hours pay at time and one half for this shift (evening shift). Should be distributed to the Crude Unit Controlman that were available to work this shift.

**Contract Provisions**

Article VI, Section 2a; Article IX, Section 14; Article IX, Section 13; and Article IX, Section 3. The language of these provisions is set forth above in Grievance 71-8.

**Findings of Fact**

1. On January 11, 1972, Grievants Larry Osborne, Don Kapus, Jay Hooper, and Jack Hindi were in the classification of Crude Unit Controlman.

2. On January 11, 1972, Grievant Larry Osborne worked from 8:00 A.M. to 4:00 P.M. breaking in T.C.C. He was called back that date to work from 8:00 P.M. to midnight in the Crude Unit. The midnight relief in the Crude Unit did not show up, and Grievant Osborne asked for the overtime.

3. Grievant Osborne's request was rejected. Instead, the Company had Mr. Buddy Watkins, of the T.C.C. classification and outside the Crude Unit classification, perform the overtime work.

4. The Company, in letter dated January 27, 1972 addressed to Mr. Abbott by Mr. Blomeyer, states:

> This is in answer to grievance 72-1 which we discussed in our meeting of January 26, 1972. In this grievance you claim that we were not within our right to go outside of the classification to fill a vacancy on the midnight shift January 11, 1972. In reviewing the records, I find that the available assigned combination unit controlmen for the week of January 10 worked at least 12 hours per day on the previous day and that both Jay Hooper and Bob Steele worked 4 hours overtime on the day in question. We filled four consecutive shifts, starting on the midnight shift Monday morning, with the last shift filled being the shift in question. The regularly assigned man worked the day shift Tuesday, then it was necessary to fill the evening shift on that day. Having to fill five shifts in two days posed a serious scheduling problem. This situation was greatly aggravated by Larry Osborne's request to train some additional time on the TCC controlman's job, he being scheduled to work the combination controlman job on Monday, Tuesday, and Wednesday evenings. We honored his request, and were surprised he grieved under these circumstances.
>
> Jay Hooper worked 12 hours of overtime on Monday and four hours of overtime on Tuesday, in addition to his scheduled shift on days Tuesday. Jack Hindi was used as a training instructor on his scheduled shift Monday, which created one of the vacancies, but he did work overtime four hours on the evening shift and was called out for eight hours overtime as a training instructor on Tuesday. Don Kapus worked four hours of overtime on Monday, then worked his scheduled evening shift on the GRP unit. Larry Osborne worked four hours overtime Monday evening after training on day shift, and trained on day shift Tuesday.
>
> In view of the above, it is difficult to understand why a grievance was presented, because considerable overtime was worked and we feel we covered the shifts in a fair and equitable manner. For these reasons I am denying this grievance.

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5. The Company, in its written communications concerning Grievance 72-1, makes no contention that an emergency situation existed.

**Positions of Parties**

The Position of the Company is derived by this Arbitrator from the Company statements made in correspondence declining Grievance 72-1. The Blomeyer letter of January 27, 1972, above quoted, states: ". . . In view of the above, it is difficult to understand why a grievance was presented, because considerable overtime was worked and we feel we covered the shifts in a fair and equitable manner. For these reasons I am denying this grievance." The Company Position is further developed by Mr. Zeien in his letter of February 17, 1972, addressed to Mr. Abbott, stating: ". . . In my estimation, the significant factor involves past practice. Back through the years, it was agreed that overtime had been worked – both in and out of classification – twelve hours and over twelve hours, without a grievance. The significant point here is that a grievance was filed only after double time after twelve hours was negotiated into the last contract. Even since then, other instances of this nature have occurred with no grievance filed. It is apparent to me that the Union has historically allowed management to decide this point using such things as qualifications, safety, etc. to determine how overtime was filled. I agree that this is the way it should be and, therefore, support the procedures now in use at the plant and deny both grievances."

The Union Position in Grievance 72-1 is basically the same as that in Grievance 71-8, and reference is here made to the Union Position set forth in that grievance. In addition, however, the Union responds to the Company scheduling argument or problem stated in Mr. Blomeyer's letter of January 27. The Union argues:

> In the second instance (72-1), more than one operator in the crude unit controlman classification could have worked the shift. The shift could have been split in two; that is, two operators could have worked

four hours each. Granted, some operators were training in another classification, but a simple re-scheduling of these men to work in their own classification in situations such as this and train at a later date could have been done – and has been done in the past. There is no set pattern as to how a man trains. In one instance (72-1), a crude unit controlman who was instructing in a lower classification on the day shift could have been called in four hours early to work half of the graveyard shift (from 4:00 A.M. to 8:00 A.M.) and then continued working the day shift (instructing) without any trouble or problem to anyone. Early call outs, or working extra hours, are a common occurrence in this refinery. (Br., p. 3).

**The Issue**

As stated by the Union, the issue is: "Did the Company violate the agreement by the manner in which they filled the crude unit controlman job vacancy on the midnight or graveyard shift from 12 midnight to 8:00 A.M. on January 11, 1972" and "if the answer is in the affirmative, what is the proper remedy?"

**Opinion of the Arbitrator**

There is no doubt in the mind of this Arbitrator that the Findings of Fact set forth above in Grievance 72-1 are correct even though the Company did not participate in the hearing. Sworn testimony and correspondence between the parties are entirely consistent and the findings of fact as stated are not subject to dispute, in the view of this Arbitrator. It is perfectly conceivable, however, that if the Company had participated, it might have developed additional facts and given a sharper focus on the scheduling problems set forth in Mr. Blomeyer's letter of January 27, and it might have developed additional facts pertaining to past practice, safety, and operating security. The Company deliberately chose, however, not to participate, and it is inappropriate for this Arbitrator to engage in conjecture on possible testimonies.

The language of Article VI, Section 2 is clear. "All work peculiar to any classified employment (job) shall be done by

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men regularly assigned to that classification (job) except that. . ." is language of command. It is imperative: "shall be done by men regularly assigned to that classification". This is certainly not permissive language, and it clearly contemplates "All work" not included in the language of exception. The language of exception is carefully specified: "except in cases of emergency or when an employee to whom such work would be assigned cannot be reached to perform the work." The clear specification of particular exceptions must necessarily be construed as intention to provide no other exceptions. If the Parties contemplated an exception where the employee had already worked twelve hours in line with the Company argument of past practice, it is obvious that no such exception is stated in the Article. Further, if the Parties contemplated an exception where considerable overtime had been worked by the employees and the Company was confronted with difficult scheduling problems, it is also obvious that no such exception is stated in the Article. No amount of practice contrary to the clear language of a written contract provision can prevail over the latter. See 48 LA 219; 48 LA 1355. This Arbitrator is without the authority to write additional exceptions into the Articles of Agreement.

Article IX, Section 4 contemplates that "employees will work overtime in rotating order of seniority." It does not appear to this Arbitrator from his reading of the January 27 letter of Mr. Blomeyer that this Section was applied by the Company in the circumstances of January 11, 1972.

**AWARD ON GRIEVANCE 72-1.**

1. The Company is in violation of Article VI, Section 2, a, and is in violation of Article IX, Section 14.

2. The Company shall pay to such Grievant or Grievants who stood for some or all of the eight hours' work pursuant to Article IX, Section 14, "in rotating order of seniority," such compensation as they would have earned had they been employed.

/s/Joseph Lazar

Boulder, Colorado
November 2, 1972

Professor Joseph Lazar, Arbitrator

**APPENDIX** **Exhibit "A" In Arbitration**

Oil, Chemical and Atomic Workers
International Union

Complaint or Grievance Report

**Grievance No.** 71-8 **Date** 12-16-1971

**Subject** 4 hours of overtime **Local No.** 2-477

**Date Complaint Occurred** 12-10-1971

**Company** Continental Oil Co. **Location** Denver #9 Refinery
5801 Brighton Blvd.
**Complainant's Name** Larry Osborne Commerce City, Colo.

**Address** 60 Leonard Lane **Phone No.** 466-0135
Northglenn, Colorado
**Job** Crude Unit Controlman **Dept.** Operations

**Service in Job** _____ **In Dept.** _____ **In Co.** _____

**Foreman** Frank Bianco **Supt.** Mr. R. B. Blomeyer

**Nature of Grievance**

Overtime was given to an employee who was not in that classification.

**State who, what, when, where, why and settlement**

On December 10, 1971 Mr. Frank Bianco gave four hours of overtime to John Winfrey, who at that time was an G.R.P. Controlman. The overtime occured in the Crude Unit Controlman available even though he had worked 12 hours, he still should have been asked if he wanted to stay for the additional four hours.

The Union feels that the Company has violated Article VI Section 2 and Paragraph a, Article 9 Section 14, and/or

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any other Articles which might apply in the Articles of Agreement between Continental Oil Company and Oil Chemical and Atomic Workers International Union and that the employee should be paid four hours overtime at double time rate as the overtime would have been in excess of 12 hours.

**Signatures** /s/ Larry Osborne _____ _____

_____ _____

C-22

**Exhibit "B" In Arbitration**

Oil, Chemical and Atomic Workers
International Union

Complaint or Grievance Report

**Grievance No.** 72-1 **Date** January 20, 1972

**Subject** Overtime (8 hrs) **Local No.** 2-477

**Date Complaint Occurred** January 11, 1972

**Company** Continental Oil Company **Location** Denver Refinery #9 P.O. Box 40 Commerce City, Colo.

**Complainant's Name** Mr. Larry Osborne

**Address** 60 Leonard Lane Northglenn, Colo. 80233 **Phone No.** 466-0135

**Job** Crude Unit Controlman **Dept.** Operations

**Service in Job** _____ **In Dept.** _____ **In Co.** _____

**Foreman** Mr. Leonard Brandt **Supt.** Mr. R. B. Blomeyer

**Nature of Grievance**

Overtime given to employee who was not working in the Crude Unit Classification.

**State who, what, when, where, why and settlement**

On January 11, 1972 Mr. Leonard Brandt (Shift foreman Denver Refinery) gave eight hours overtime to Mr. Buddy Watkins, who at that time was working in the T.C.C. Classification. The overtime occurred in the Crude Unit Classification, Mr. Larry Osborne, Mr. Don Kapus, Mr. Jay Hooper, and Mr. Jack Hindi, who were Crude Unit Controlman should have been given this eight hours overtime.

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The Union feels that the company has Violated Article VI Section 2 Paragraph a. and Article IX Section 14. and/or any other Articles which might apply in the Articles of agreement between Continental Oil Company and the Oil Chemical and Atomic Workers International Union.

We believe that the eight hours pay at time and one half for this shift (evening Shift). Should be distributed to the Crude Unit Controlman that were available to work this shift.

**Signatures** /s/ Larry Osborne _____

/s/ Thomas J. Hooper _____

**Exhibit "C" In Arbitration**

Continental Oil Company
P.O. Box 2197
Houston, Texas 77001
(713) 225-1511

February 17, 1972

Mr. R. J. Abbott, Chairman
Workmen's Committee
Denver Local 2-477 OCAWIU
181 E. 109th Place
Northglenn, Colorado 80233

Dear Mr. Abbott:

This is in answer to Grievances 71-8 and 72-1 concerning assignment of overtime out of classification which we discussed in Denver on February 11, 1972.

These two issues were extremely involved as to detail. Because of this, a number of reasons were given – pro and con – as to why this practice could or could not be done. In my estimation, the significant factor involves past practice.

Back through the years, it was agreed that overtime had been worked – both in and out of classification – twelve hours and over twelve hours, without a grievance. The significant point here is that a grievance was filed only after double time after twelve hours was negotiated into the last contract. Even since then, other instances of this nature have occurred with no grievance filed.

It is apparent to me that the Union has historically allowed management to decide this point using such things as qualifications, safety, etc. to determine how overtime was filled. I agree that this is the way it should be and, therefore, support the procedures now in use at the plant and deny both grievances.

Very truly yours,

J. T. Zeien
Manager of Operations
Refining Department

BLEED THROUGH

gl
CC:
Mr. Robert L. Marsh, Representative
OCAWIU AFL-CIO-CLC
6334 W. Burgundy Dr.
Littleton, Colo. 80120

Mr. R. B. Blomeyer
Continental Oil Company
Commerce City, Colorado

**Exhibit "D" In Arbitration**

Continental Oil Company
P.O. Box 2197
Houston, Texas 77001
(713) 225-1511

April 12, 1972

Mr. Robert Jay Abbott, Chairman
Continental Workmen's Committee
Denver Local 2-477 OCAWIU
181 East 109th Place
Northglenn, Colorado 80233

Dear Mr. Abbott:

I have before me your correspondence announcing your intention to arbitrate Grievances 71-8, 72-1, and 72-2.

Mr. Cooper S. Allen, Director of Personnel Relations in our Billings Refinery, will serve as the Company arbitrator and is prepared to meet with Mr. Edwards on number 72-2, and with Mr. Steele on numbers 71-8 and 72-1 at any time during the week of April 24.

Mr. Allen will await your call to discuss a time during that week convenient to you.

Yours very truly,

J. T. Zeien
Manager of Operations
Refining Department

gl
CC:
Mr. R. B. Blomeyer
Continental Oil Company
Denver Refinery
Commerce City, Colorado 80022

Mr. Cooper S. Allen
Continental Oil Company
P.O. Box 2548
Billings, Montana 59103

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**Exhibit "E" In Arbitration**

Oil, Chemical and Atomic Workers
International Union

DENVER LOCAL No. 2-477 DENVER, COLORADO

CERTIFIED MAIL 867214
RETURN RECEIPT REQUESTED

May 10, 1972

Mr. Cooper S. Allen, Company Arbitrator
Continental Oil Company
P. O. Box 2548
Billings, Montana 59103

Dear Mr. Cooper:

Reference is made to your two letters of May 5, 1972, in which you request a separate list of arbitrators for grievances 71-8 and 72-1.

These two grievances are similar in nature and were tied together in Mr. Zeien's answer to the Union in his letter dated February 17, 1972. As you well know, these two grievances have been handled together from that point on, and you were advised on May 3, 1972, that the Union wished to procede in that manner.

It is the Union's position that these two grievances be heard by only one impartial arbitrator.

Yours truly,

Robert G. Steele,
Arbitrator for the Union
6473 Reed Court
Arvada, Colorado 80002

c–Robert J. Abbott
file

# APPENDIX D

ARTICLES OF AGREEMENT
between
CONTINENTAL OIL COMPANY
(hereinafter referred to as the "Company")
and
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION
AFL-CIO, AND ITS LOCAL 2-477
(hereinafter referred to as the "Union", acting for and in behalf of the employees of the Company who are members of the Oil, Chemical and Atomic Workers International Union, AFL-CIO.)

## ARTICLE IV

### Grievance Procedure

1. For the purpose of this Agreement a grievance shall mean complaints, disputes or claims of unfair treatment involving the application or interpretation of the terms of this Agreement.

2. For the purpose of adjusting grievances the following procedure shall apply. A grievance not presented as stated hereunder shall be waived and thereafter may not be presented for consideration or adjustment or be made the basis for any action under this Agreement or otherwise.

a. Each employee and/or his Union Representative shall within fifteen days of the date of the incident giving rise to the grievance first seeks direct adjustment with the foreman under whom he is employed. The Foreman shall within five days give the employee his decision on the grievance; however, the employee has the right to have his complaint heard by the department head if he so desires. Such grievance shall be taken up without undue interruption of work.

b. If such employee fails to obtain satisfaction from his foreman he may, through his Union representative, within fifteen days of the date on which grievance was filed, submit the grievance to the Company representative locally in charge, with a request for a meeting to be held between the Workmen's Committee and representatives of the Company within ten days, excluding the date of request. Such written grievance shall specify the contract clause or clauses allegedly violated, and the details constituting such alleged violation. Company representatives and the Workmen's Committee shall meet as requested to confer on the grievance, and within five days after the meeting (excluding the date of the meeting) the Company representative locally in charge shall give his written decision on the matter to the Chairman of the Workmen's Committee or his designee.

c. If the employee fails to obtain satisfaction through the foregoing, he may, through his Union representative, appeal the grievance to the Refining Department Manager of Operations or his appointee from outside the refinery within fifteen days of the written decision by the Company representative locally in charge, and request a meeting with the Workmen's Committee to confer about the grievance. In this appeal the matter is to be handled with the least possible delay, but in not more than 30 days, excluding day of receipt of such written appeal.

3. In case of discharge or suspension resulting from disciplinary action employees who desire to file complaints must present such complaints within seven days (excluding effective date of discharge) to the Committee and Company representative mentioned in this Article. When an employee is discharged or suspended he shall be given written notice dated and signed by his foreman or other representative of the Company setting forth the reason. The Committee shall give notice of intent to take up such grievance to the Company representative locally in charge within twenty calendar days of the effective date of discharge or suspension.

4. All days referred to in this Article IV and the succeeding Article V shall exclude Saturdays, Sundays and contract holidays.

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5. Any individual employee or group of employees shall have the right at any time to present grievances to the Company and have such grievances adjusted without the intervention of the Union, as long as the adjustment is not inconsistent with the terms of this Agreement and providing the Union shall be notified that a conference is to be held and shall have the opportunity of having a representative present at such adjustment.

## ARTICLE V

### Arbitration Procedure

1. If the Union is dissatisfied with the decision as provided in Section 2c of Article IV, Grievance Procedure, or if a decision is not rendered within the time limit specified therein, the Union may within forty-five days from the date of such decision, or the expiration of time to render such decision, give the Refining Department Manager of Operations and the Refinery Manager written notice of its desire to carry the matter to arbitration. Said written notice shall designate the arbitrator for the Union and shall be signed by the Chairman of the Workmen's Committee.

2. Within ten days following receipt of the Union's request for arbitration the Company shall notify the Union of the name of the arbitrator selected by it. The two arbitrators so named shall confer within ten days following such notification and attempt to resolve the question. If the two arbitrators cannot resolve the question within five days following the date of their first conference, the Company will prepare a letter for joint application to the Federal Mediation and Conciliation Service, requesting that a list of five arbitrators be furnished.

3. Upon receipt of the list from the Federal Mediation and Conciliation Service the Company and the Union arbitrators shall select a neutral arbitrator by alternately striking names until one name remains. Thereafter the parties shall notify the arbitrator whose name is not eliminated of the precise issue to be arbitrated and of mutually acceptable dates and places for the holding of the arbitration.

4. As soon after his selection as is reasonably practicable the neutral arbitrator shall choose a date and place for hearing, and at such hearing both Company and the Union shall be permitted to have representatives present, and to present evidence and arguments to the neutral arbitrator. Each party shall have the privilege of cross-examining witnesses presented by the opposite party. The decision of the neutral arbitrator shall be rendered in writing in a decision stating reasons for the award within thirty days of the date of the hearing.

5. The only grievances which shall be arbitrable shall be those meeting the following conditions:

a. Grievances arising between the Union and the Company relating only to the interpretation or performance of this Agreement which cannot be adjusted by mutual agreement.

b. The grievance specifically designates the express provision or provisions of this Agreement alleged to have been violated, and the manner in which it or they have been violated.

6. The sole function of the neutral arbitrator shall be to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance. The arbitrator shall have no power or authority to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect.

7. The decision of the neutral arbitrator shall be final and binding upon both parties signatory thereto and retroactive to the date on which the grievance was first submitted in writing to the Manager of the refinery.

8. The expense of the arbitrator selected by the Company shall be borne by the Company; the expense of the arbitrator selected by the Union shall be borne by the Union, and the expense of the neutral arbitrator, if such is selected, shall be shared by the company and the Union equally.

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